IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1971 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DINESH AGARSING RATHOD (CHHARA - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR HR PRAJAPATI for Applicant(s) : 1,
MR AY KOGJE APP for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 18/04/2007

ORAL JUDGMENT

In this petition, the petitioner has challenged an order dated 16th March, 2006 passed by the Dy. Commissioner of Police, Zone 5, Ahmedabad City, as upheld by an appellate order dated 2nd September, 2006, passed by the Joint Secretary, Home Department, Govt. of Gujarat.

2. Shortly stated facts leading to the petition are that the petitioner was served with a show cause notice dated 6th August, 2005 issued under Section 59 of the Bombay Police Act (hereinafter referred to as the "B.P.Act") calling upon the petitioner to show cause why he should not be externed for a period upto two years from Ahmedabad City and rural areas and adjoining areas of Gandhinagar, Kheda, Mehsana Districts. In the show cause notice the authorities had indicated as many as eight different instances of criminal activities committed by the petitioner in the recent past of about three months prior to the date of issuance of the show cause notice. The instances included those of forcibly collecting money

by physical assaults and extortion.

2.1. In the show cause notice it was stated that the petitioner is in a habit of carrying a knife and he threatens and terrorizes. He collects installments from small traders and beats up those who oppose him.

2.2. The show cause notice specifically stated that the witnesses of these instances are not willing to depose against him because of terror and out of fear. It is stated that on account of these reasons such persons have neither filed police complaints nor are desirous of filing of any such complaints.

2.3. The petitioner replied to the show cause notice. In his reply dated 9th September, 2005 he refuted the charges and opposed the proposal of externment.

2.4. The competent authority under the B.P.Act however, on 16th March, 2006 passed an order of externing the petitioner from the geographical limits

of the jurisdiction of the Ahmedabad city and adjoining Districts and further provided that he shall not enter such areas for a period two years from the date of the order.

2.5. Aggrieved by the said order dated 16th March, 2006, the petitioner preferred an appeal to the State Government. The appeal of the petitioner however came to be turned down by order dated 2nd September, 2006 passed by the Joint Secretary, Home Department, Govt. of Gujarat.

2.6. The petitioner has, therefore, approached this Court challenging the said orders externing him for a period of two years.

3. Learned advocate Shri M.R.Prajapati for the petitioner submitted that the authorities travelled beyond the show cause notice and taking into consideration the material which was never disclosed to the petitioner. It was contended that in the show cause notice, the authorities did not disclosed that statements of secret witnesses have been recorded in

support of the alleged instances of illegal activities of the petitioner. It was contended that the petitioner was not aware about recording of any such statements and he, therefore, did not have any opportunity to make a representation in this regard.

3.1. Learned advocate Shri Prajapati further submitted that the competent authority while passing the order on 16th March, 2006 specifically recorded that he has taken into account all the materials placed before him. The appellate authority in the order dated 2nd September, 2006 noted that considering the statements given by the secret witnesses and treating them as independent evidence, there is sufficient material in support of the allegations made against the petitioner. Learned advocate Shri Prajapti submitted that from this narration, it can be seen that statements of secret witnesses were recorded by the authorities and also taken into consideration for passing the externment order against the petitioner.

3.2. In support of this contention reliance was

placed on the decision of the learned Single Judge in case of **Haresh alias Kali Mohandas v. Sub-Divisional Magistrate, Anajar and Anr. reported in 2003 CRI. L.J. 4379,** wherein the learned Judge was pleased to quash the externment order on the basis that in the show cause notice there was no indication that statements of witnesses were recorded which statements were eventually relied upon by the externing authority to pass an adverse order against the petitioner therein.

4. On the other hand learned APP Shri Kogje opposed the petition and submitted that in the show cause notice eight instances were cited to demonstrate the criminal background of the petitioner. It was pointed out that on several occasions the petitioner had indulged in criminal activities of extortion and assault. He submitted that on account of the terror that the petitioner spread in the locality, no witnesses were prepared to come forward to depose against the petitioner or to file any criminal complaint.

4.1. He further submitted that the statements of secret witnesses were in support of the instances cited in the show cause notice itself. It would, therefore, not be necessary to separately indicate to the petitioner in the show cause notice that statements of the witnesses have been recorded.

4.2. Learned APP further submitted that in any case the externing authority did not rely on such statements as can be seen from the order itself. He, therefore, submitted that the petition should be dismissed.

5. Having heard learned advocates appearing for the parties, it is clear that in the show cause notice there is no mention of any statements having been recorded of secret witnesses. In fact the show cause notice suggested that no person on account of fear and terror of the petitioner is willing to depose against the petitioner or lodge a complaint. It is true that in the impugned order dated 16th March, 2006, the Dy. Commissioner of Police, has not referred to specifically any of the statements of the

witnesses. However, the fact that such statements have been recorded is not seriously in dispute. This fact is clearly borne out from the appellate order wherein the Joint Secretary records that considering the statements of secret witnesses, there is sufficient material on record to establish allegations against the petitioner. In that view of the matter, when the Dy. Commissioner of Police, in his impugned order recorded that he has taken into account all materials on record, the reference has to be to the statements of witnesses also.

5.1. Additionally, I find that the appellate authority placed heavy reliance on such statements though there was no reference to such statements in the show cause notice.

6. In view of this factual background, I find that the ratio laid down in the decision of **Haresh alias Kali Mohandas v. Sub-Divisional Magistrate, Anajar and Anr.** would apply in the present case also.

6.1. In the said decision, the learned Judge of

this Court was pleased to set aside the externment order which was based on statements of witnesses recorded though no such reference was made in the show cause notice. For the said purpose the learned Judge was pleased to rely on the observations made by the Division Bench of this Curt in the case of **Aswin Chandulal Jaiswal v. Deputy Commissioner of Police, Vadodara and Anr. reported in 1990 (1) GLH 314,** which observations are reproduced herein below.

> *"9. Shri Gupta has also stated in his affidavit that the Inspector, Vadi Police Station, Vadodara, had recorded statements of 11 persons in confidence. He further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such*

alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order, at least, the person to be affected by such order should be given an opportunity to explain the allegations in the statements. The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the externing authority and, therefore, also the order is vitiated."

7. Learned APP Shri Kogje however submitted that there was reference to the different instances with respect to which instances alone with such statements would have been recorded. It would, therefore, not necessary to make separate reference in the show

cause notice itself. I am afraid, the contention cannot be accepted. Firstly, it is only a matter of conjuncture that the statement of secret witnesses pertain to eight instances of illegal activities attributed to the petitioner. Secondly, non-discloser of reference of such statements would hamper the petitioner in making his representation to the authorities and would also eliminate a safeguard that only such materials which is referred to in the show cause notice after putting the petitioner to notice thereof is taken into consideration by the authorities for the purpose of passing the final order.

8. Considering all these irregularities, the impugned order cannot be sustained. In the result, the order dated 16th March, 2006 as upheld by the appellate authority as well as the appellate order are quashed. Petition is disposed of accordingly. Rule is made absolute. Direct service is permitted.

[AKIL KURESHI, J.]

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